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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCOTT PARENT etc. et al., Plaintiffs and Appellants, v. STATE OF CALIFORNIA, DEPARTMENT OF TRANSPORTATION et al., Defendants and Respondents.	G041842 (Super. Ct. No. 07CC0262) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Robinson, Calcagnie & Robinson, Mark P. Robinson, Jr.; The Arkin Law Firm, Sharon J. Arkin, for Plaintiffs and Appellants.

Ronald W. Beals, Chief Counsel, Jeffrey R. Benowitz, Deputy Chief Counsel, Glenn B. Mueller, John Frederick Smith, David J. Lopez, and Richard D. Heinrich, for Defendant and Respondent State of California.

Wesierski & Zurek, Ronald Zurek for Defendant and Respondent Harold Jerome Stulberg.

Jennifer Parent was severely injured when she was hit by a car, driven by Harold Stulberg, while she was in a crosswalk on a state highway. Parent and her husband (individually and as her guardian ad litem), sued Stulberg and the State of California Department of Transportation (Caltrans), alleging the crosswalk constituted a dangerous condition of public property.[1] A jury returned a special verdict finding the crosswalk was not a dangerous condition, and Stulberg alone was responsible for the accident. It awarded Parent $13,313,046, and awarded her husband $5,000,000, against Stulberg.

On appeal, Parent contends the jury was not properly instructed on what constitutes a dangerous condition under Government Code section 830, subdivision (a). All parties—including Parent—requested the jury be instructed with the pattern jury instruction, CACI No. 1102. Parent argues on appeal that CACI No. 1102 did not specifically state the negligence of any person involved in the particular accident is not relevant in assessing if the public property was in a dangerous condition and that additional clarifying instructions she requested at trial were therefore required. She also contends a jury inquiry about the special verdict form question on dangerous condition was not properly responded to by the trial court and demonstrated the jury was inadequately instructed on dangerous condition. Although the circumstances of Parent's accident are tragic, we conclude there was no error in CACI No. 1102, and the trial court did not abuse its discretion in any of its rulings. Accordingly, we must affirm the judgment.

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[1] The plaintiff and appellant is Scott Parent, individually and as guardian ad litem for Jennifer Parent, an incapacitated adult. For convenience, in this opinion we will refer to Jennifer Parent (Parent) in the singular as the plaintiff and appellant unless the context indicates otherwise.

I

FACTS & PROCEDURE

A. Trial Evidence

Plaintiff's Case

Parent and her friend, Julie Miller, were in a crosswalk crossing Pacific Coast Highway (PCH) at Calliope Street in Laguna Beach when Parent was struck by a car driven by Stulberg. Parent was severely injured. Stulberg was driving northbound on PCH in excess of the posted speed limit and did not see the women before the accident.

Parent presented evidence supporting her claim the Calliope/PCH intersection and the crosswalk, maintained by Caltrans, constituted a dangerous condition for many reasons including: PCH has very high traffic volume and about 15 percent of the vehicles are speeding; the intersection was particularly dark and blind spots and diminished lighting at dusk made the crosswalk not visible to northbound traffic until a car is about 170 feet away from it; "PED XING" was not painted on the road leading up the crosswalk; and zebra striping on the crosswalk could give pedestrians a false sense of security.

Parent contended Caltrans increased the danger at the Calliope/PCH intersection by failing to install an active warning system. She introduced evidence active crosswalk warning systems, including traffic lights and "Light Guard" systems, which flash to warn drivers a pedestrian is crossing, are superior to the Calliope crosswalk, which was only marked with painted lines. Every intersection south of Calliope on PCH for several miles had some sort of active crosswalk warning system, which could lull northbound drivers into relying on active warnings and not anticipate a crosswalk without such warnings. The intersection to the immediate north of Calliope, at Mountain and PCH, had an active warning system, and the Calliope crosswalk and its warning sign were on the north side of the Calliope/PCH intersection, all of which could

combine to focus a driver's attention on the Mountain/PCH intersection, not the Calliope/PCH intersection.

Parent introduced evidence there was a pedestrian accident history at the Calliope/PCH intersection, including a fatality in 1999 that Caltrans attributed to the Mountain/PCH intersection in assessing the effectiveness of active crosswalk warning systems. Caltrans had received citizen complaints about the Calliope/PCH intersection.

Caltrans' Defense

There was also extensive evidence supporting Caltrans' defense. First, there were the details of the accident itself. Stulberg was driving north on PCH, going about 10 miles per hour over the posted speed limit of 30 miles per hour. He never saw the traffic signs, the crosswalk, or the two women in the crosswalk moving from his left to the right in front of his car. When interviewed after the accident, Stulberg did not believe he had struck a person, he just knew something had crashed through his windshield. He thought the collision was well north of the crosswalk, and the women were not in the crosswalk, but were jaywalking. Stulberg thought he was driving about 25 miles per hour.

Another driver, also going northbound, saw the women in the crosswalk and slowed his car well before the intersection. He saw Stulberg coming up on his right and could tell he was not going to stop for the pedestrians. The driver began flashing his lights and honking his horn to alert Stulberg, to no avail. As Parent and Miller were walking across, Miller could see Stulberg's car was not stopping. She grabbed Parent by the hand and started pulling her running the rest of the way across. As Miller jumped to the sidewalk, she could feel Parent's hand pulled away from her as Parent was struck by Stulberg's car.

Caltrans introduced expert testimony of a traffic engineer that in the 10 years preceding the accident over 73 million northbound vehicles had crossed the Calliope/PCH crosswalk and there were no other accidents involving northbound vehicles

hitting pedestrians in the crosswalk. There had been three automobile vs. pedestrian accidents in the area of the Calliope/PCH intersection between 1996 and 2006. One involved a *southbound* car hitting a pedestrian who was in the crosswalk. One involved the crosswalk crossing Calliope, not the crosswalk on PCH. The third, the 1999 fatality, involved a pedestrian who was jaywalking about 100 feet north of the Calliope/PCH crosswalk.

The expert witness testified Caltrans' computer system for monitoring areas of high accident rates was working well, and the assessments of the Calliope/PCH intersection were properly performed. A northbound vehicle on PCH could clearly see the crosswalk warning sign at its location 400 feet south of the crosswalk and see the crosswalk itself at that point. Because of a slight curve, the driver would then not be able to see the crosswalk for an instant, but it was then clearly visible again from 250 feet south, well within stopping sight distance of the crosswalk. Based on his training and experience, the expert opined the Caltrans engineer who designed and installed the crosswalk exercised appropriate engineering judgment and the crosswalk conformed with Caltrans' standards.

B. Procedural Facts

Jury Instructions Given and Refused

Parent and Caltrans both requested, and the court gave, various form CACI jury instructions. They included the 2003 version of CACI No. 1102,[2] which defines "dangerous condition" in accordance with Government Code section 830, subdivision (a). The instruction read: "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public who are using the property with reasonable care and in a reasonably foreseeable manner. A condition that

[2] Unless otherwise indicated, all references to CACI No. 1102 are to the 2003 version.

creates only a minor risk of injury is not a dangerous condition." The trial court gave the jury CACI instructions on contributory negligence, apportionment of fault, and causation.[3]

Although Parent requested the unmodified version of CACI No. 1102 be given, she also submitted six special jury instructions pertaining to the definition of "dangerous condition." Parent's Special Jury Instruction No. 5 provided: "In order to establish a dangerous condition, the plaintiffs are not required to prove due care on the part of Jennifer Parent or . . . Stulberg or Julie Miller in connection with this particular accident. The law does not require the plaintiff to prove that the property was actually

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[3] They included: CACI No. 405 [contributory negligence]: "Defendants [Caltrans]. . . and . . . Stulberg claim that [Parent's]. . . harm was caused in whole or in part by . . . Parent's own negligence. To succeed on this claim, Defendants must prove both of the following: [¶] 1. That [Parent] was negligent; and [¶] 2. That [Parent's] negligence was a substantial factor in causing their harm. [¶] If Defendants prove the above, [Parent's] damages are reduced by your determination of the percentage of [Parent's] responsibility. I will calculate the actual reduction." CACI No. 406 [apportionment of responsibility]: "Defendant [Caltrans] claims that the fault of . . . Miller was a substantial factor in causing [Parent's] harm. To succeed on this claim, [Caltrans] must prove both of the following: [¶] 1. That . . . Miller was at fault; and [¶] 2. That the fault of . . . Miller was a substantial factor in causing [Parent's] harm. [¶] If you find that the fault of more than one person including [Caltrans, Stulberg,] and [Parent] and . . . Miller was a substantial factor in causing [Parent's] harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent. [¶] You will make a separate finding of [Parent's] total damages, if any. In determining an amount of damages, you should not consider any person's assigned percentage of responsibility." CACI No. 430 [causation: substantial factor]: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." CACI No. 431 [causation: multiple causes]: "A person's negligence may combine with another factor to cause harm. If you find that Defendants [Caltrans'] and/or . . . Stulberg's fault was a substantial factor in causing [Parent's] harm, then Defendants [Caltrans] and/or . . . Stulberg are responsible for [Parent's] harm. Defendants cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [Parent's] harm."

being used with due care at the time of [her] injury, either by herself or by the driver of the automobile involved in the accident."[4]

On January 13, 2009, the court and counsel had an unreported conference to discuss jury instructions, and Parent's special instructions were refused. Counsel began their closing arguments in the morning session on January 13, and concluded them the next morning, and the court instructed the jury.

The jury retired to deliberate with a jointly prepared special verdict form that asked it to answer 12 questions. Questions Nos. 1 and 2 were "[w]as defendant . . . Stulberg negligent" and if so "was [his] negligence a substantial factor in causing [Parent's] harm?" Question No. 3 asked the jury, "Was the property of defendant [Caltrans] in a dangerous condition at the time of the incident?" and questions Nos. 4 through 7 were related to that question in the event the answer to question No. 3 was "yes." Questions Nos. 8 and 9 asked if Parent was also negligent, questions Nos. 10 and 11 asked about Parent's damages, and question No. 12 asked the jury to determine the percentage of fault of all parties and Miller.

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[4] The other special instructions included: Special Jury Instruction No. 4: "Although a third person may have been concurrently negligent with a public entity, the latter is not necessarily relieved from liability. Foreseeability is the primary element. What is required to be foreseeable is the general character of the event or harm-not its precise nature or manner of occurrence." Special Jury Instruction No. 6: "A plaintiff is not required to personally prove that she, or to [*sic*] any foreseeable user of public property, was free from fault before recovering from a public entity for injuries suffered on the property. However, principles of comparative fault may apply." Special Jury Instruction No. 7: "A condition of public property may be dangerous within the meaning of these instructions, even when risks created by a condition of the property arise only as a result of negligent conduct of another person." Special Jury Instruction No. 8: "The negligence of another person does not negate the existence of a 'dangerous condition' within the meaning of these instructions. If another person's negligence is foreseeable, such conduct may be the very risk which makes the public property dangerous when considered in conjunction with other features of the property." Special Jury Instruction No. 9: "If public property is in a dangerous condition, the public entity is not relieved of liability simply because of a third party user's negligence."

The jury began deliberating on January 14. On the morning of January 15, counsel placed on the record a settlement agreement between Parent and Stulberg.

On January 15, at 3:41 p.m., the jury sent a note to the court: "We need help on question [No.] 3. Clarification would really help." By that time, the trial judge, Robert J. Moss, had left the courthouse due to illness. Counsel met with Judge David T. McEachen to discuss the note and their discussion was unreported, but the result was that all counsel agreed to Judge McEachen's written response given to the jury at 3:55 p.m.: "You yourselves as jurors must answer Question [No.] 3." The jury deliberated for another one-half hour and was excused for the night.

The next morning, the jury resumed deliberations. Counsel again met with Judge McEachen with whom they held a conference call with Judge Moss. Parent's counsel explained that after further consideration and researching the matter overnight, he was concerned the jury's question the day before about question No. 3 on the special verdict form suggested the jury was confused about the definition of "dangerous condition." Counsel was concerned about whether the jury understood the term "due care" (or "reasonable care") as used in CACI No. 1102 did not refer to the care exercised by anyone involved in the specific accident but only to due care exercised by the public generally. He noted CACI No. 1102 did not contain the same language that had been included in its BAJI counterpart, BAJI No. 11.54, which in relevant part read, "The phrase 'used with due care' refers to whether the condition would result in injuries when used with due care by the public generally. It does not refer to the care used by any person in connection with this particular accident." Counsel noted Parent's Special Jury Instruction No. 5, which had been refused, embraced the BAJI No. 11.54 concept.

Although Parent's counsel conceded, "really [CACI No.] 1102 wasn't ambiguous," he urged that when read in combination with the question No. 3 on the special verdict form—"Was the property of defendant [Caltrans] in a dangerous condition at the time of the incident?"—there was an ambiguity that needed clarification. He

asked the court to give this clarifying instruction, "In order to establish a dangerous condition, the plaintiffs are not required to prove due care on the part of Jennifer Parent or . . . Stulberg or Julie Miller in connection with this particular accident."

Caltrans' counsel objected to giving a clarifying instruction, arguing it was speculation that the jury was confused in the manner Parent's counsel suggested—the jury had given no indication as to the nature of its problem with question No. 3 on the special verdict form. Judge Moss agreed, observing it would be inappropriate to infer specific jury confusion. Accordingly, it was agreed by all counsel that Judge McEachen would first ask the jury to "'Please be more specific about your confusion on Question [No.] 3.'" The court's written inquiry ("[p]lease provide the court with more specific information regarding what it was about Question No. 3 that needed 'clarification'?") was submitted to the jury at 10:44 a.m. The foreperson replied, "Your response yesterday forced us to make our decision. We have voted and moved on. Thank you."

Parent's counsel asked the court to give the clarifying instruction anyway, asserting his proposed clarifying instruction was a correct statement of the law and it would do no harm to give it just in case the jury had been confused about CACI No. 1102. Caltrans' counsel disagreed, arguing giving the additional instruction would improperly "inject ourselves into [the jurors'] deliberations, based upon our speculations as to what process they may be using or at what stage they are in their deliberations, is going to be a direction to them that they need to go ahead and revisit this particular question that they have already told us they have resolution on. [¶] We should not be injecting ourselves into their deliberations." The trial court (Judge Moss) concluded giving the proposed instruction was not appropriate because "we are speculating as to what's on this jury's mind, and I think the CACI instructions cover the law, . . . at this point they haven't asked for any further instruction. [¶] We offered to give them some. They said they didn't need it. I am going to let them make their minds up."

At 11:50 a.m., the jury reached its verdict. It found 12 to 0 that Stulberg had been negligent, and it found 9 to 3 there was not a dangerous condition of public property. The jury found no negligence on the part of Parent, apportioned 100 percent of the fault to Stulberg, and awarded Jennifer Parent damages of $13,313,046 and Scott Parent loss of consortium damages of $5,000,000.

C. Post-Verdict Motions

Parent filed motions for a new trial and judgment notwithstanding the verdict (JNOV). As relevant to the issue on appeal, Parent sought a new trial on the ground the jury instructions on dangerous condition were inadequate and the court failed to adequately respond to the jury's request for clarification.[5] Parent's motion included declarations from two jurors, one of whom stated that during deliberations, "[s]ome of the jurors stated Stulberg's negligence precluded the finding of dangerous condition." The other juror stated that during deliberations jurors were having difficulty with question No. 3 on the special verdict form, but he did not explain what the difficulty was.

Caltrans' opposition to Parent's new trial motion included declarations from five jurors, three of whom denied there was any confusion expressed by jurors over whether Stulberg's negligence precluded a finding of dangerous condition. In oral argument, the court refused to consider the juror declarations, commenting to counsel: "We cannot use juror declarations to penetrate the mental process of the jurors, you know that, as to what their reasoning was for the outcome."

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[5] Parent's new trial motion also was brought on the grounds of irregularity in the jury proceedings (Code Civ. Proc., § 657, subd. (1)), due to malfunctioning audio-visual equipment that prevented jurors from rewatching during deliberations Parent's DVD depicting the conditions at the accident sight. Although our dissenting colleague discusses this equipment mishap in concluding Parent did not obtain a fair trial (dis. opn., pp. 5-6), we note Parent does not raise any issue on appeal concerning the equipment.

The trial court denied the motions. It found the pattern CACI instructions on dangerous condition adequately set forth the law and Parent's special instructions simply repeated the principles "and unduly emphasized them." As for "the jury's request for clarification, [Parent's] counsel agreed with the response Judge McEachen gave them. There was no objection by [Parent]. On the following day when [Parent] reconsidered this response a note was sent in to the jury to have them be more specific about any confusion. Their response at this time was that they had resolved the issue and 'moved on.' It is speculation that the issue was the same one [Parent's] attorney was worried about. Further instruction at this point would have been 'blind' as there was no way to tell what their prior confusion was about. The court may not rely on juror declarations to assess the jurors' mental processes in coming to their decisions."

II

PENDING MOTIONS

Prior to addressing the merits of Parent's appeal, we address the numerous pending motions.

A. Parent's September 9, 2009, Motion to Augment the Clerk's Transcript

On September 9, 2009, in conjunction with filing her opening brief, Parent filed her first motion to augment the clerk's transcript with two documents. One was the declaration from the jury foreperson that was part of Caltrans' opposition to Parent's new trial motion. On September 25, we granted the motion as to that document but deferred ruling as to the other.

The other document Parent seeks to add to the clerk's transcript is a brief she prepared in support of her request for a clarifying instruction. Parent states the brief was filed with the trial court on January 16, 2009, and she designated it as part of the clerk's transcript, but it was not included. Caltrans opposes this augmentation because there is no indication the brief was ever filed with trial court. The register of action

makes no reference to the document and the copy Parent has provided is not marked as being filed.

We cannot augment the clerk's transcript absent demonstration the document was lodged or filed in the trial court. (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1.) Accordingly, Parent's September 9, 2009, motion to augment the clerk's transcript is denied as to pages 1 through 6. We note there is no prejudice to Parent in this ruling. The clarifying instruction she requested and her arguments in support of giving the instruction were stated on the record by her counsel and are contained in the reporter's transcript.

B. Parent's September 29, 2009, Motion to Augment the Clerk's Transcript

After we deferred ruling on Parent's first motion to augment the record, she filed a second motion on September 29, 2009. In this one, she asks to augment the clerk's transcript with her moving papers and reply papers filed in conjunction with her motions for new trial and JNOV. Caltrans opposes the motion for various reasons, including that Parent is simply making another attempt at getting the clarifying instruction brief (which was an attachment to the new trial motion) before us (when we had already deferred ruling on her first augmentation request). Parent's reply confirms as much.

We conclude there is no reason to augment the record on appeal with Parent's motion for JNOV because no issues are raised on appeal that concern that motion. However, given that Caltrans' opposition to the motion for new trial was in the original clerk's transcript, it is appropriate that Parent's moving papers on that motion be part of the record on appeal as well. Accordingly, Parent's September 29, 2009, motion to augment the clerk's transcript is granted as to pages 1 through 99, and denied as to pages 100 through 156.

C. Parent's December 7, 2009, Motion to Strike Portions of Caltrans' Respondent's Brief

Caltrans filed its respondent's brief on November 10, 2009. In it Caltrans refers to statements in juror declarations it had submitted in its opposition to Parent's new trial motion (which was included as part of the original clerk's transcript), including the declaration of the jury foreperson (which was made part of the clerk's transcript at Parent's request and to which Parent specifically referred in her opening brief). We note Parent raised no objections to those declarations below and in fact offered several of her own juror declarations. Parent's reply brief, filed on December 7, similarly does not challenge Caltrans' references to the juror declarations, but concurrent with her reply brief, she filed a motion to strike all references in Caltrans' respondent's brief to the juror declarations because they were inadmissible under Evidence Code section 1150 [evidence of juror mental process inadmissible]. And recognizing she relied on many of those same statements in her opening brief, Parent agrees those references should be stricken as well.

Parent's motion is denied. She raised no objections to the declarations below. Furthermore, the trial court made clear it well understood it "could not use juror declarations to penetrate the mental process of the jurors" and it would not consider any statements in the declarations concerning any juror confusion (or lack thereof) about the dangerous condition instruction.

D. Caltrans' December 22, 2009, Motions to Strike Stulberg's Respondent's Brief, Parent's Reply Brief, and Parent's Notice of Designation of Trial Court Exhibits

Caltrans has filed a motion to strike Stulberg's respondent's brief. The brief does not address any legal issue, satisfies none of the requirements of an appellate brief (Cal. Rules of Court, rule 8.204), and is nothing more that a resubmission of a declaration from Stulberg's attorney that was earlier submitted by Parent in relation to

her second motion to augment the clerk's transcript. We agree with Caltrans and order Stulberg's respondent's brief stricken.

Caltrans next asks that we strike Parent's reply brief as untimely filed because it was filed more than 20 days after its respondent's brief was filed. (Cal. Rules of Court, rule 8.212(a)(2).) The motion is denied. Stulberg was also a respondent of record and Parent's reply brief was filed within 20 days of his timely-filed respondent's brief. Although we order Stulberg's brief stricken, that does not render Parent's reply untimely.

Finally, Caltrans asks us to strike Parent's notice designating trial exhibits. We deny the motion. Parent did not designate any exhibits to be copied and included as part of the clerk's transcript, as she is permitted to do under California Rules of Court, rule 8.122(a)(3). But on December 8, 2009, she filed a notice designating exhibits and she transmitted them to us. That notice was within 10 days of the filing of Stulberg's respondent's brief. (Cal. Rules of Court, rule 8.224(a) & (b) [must designate exhibits to be transmitted within 10 days after last respondent's brief is or could be filed; and transmit within 20 days unless court orders otherwise].) Although Parent's notice was erroneously labeled, given that exhibits are deemed to be part of the record on appeal (Cal. Rules of Court, rule 122(a)(3)), that we have authority to request exhibits at any time (Cal. Rules of Court, rule 8224(d)), and that there is no suggestion by Caltrans the exhibits are not the original trial exhibits, we find no reason to strike the notice or reject the exhibits.

E. Parent's Request for Judicial Notice

On February 2, 2010, Parent filed a motion asking us to take judicial notice of documents found on the California Judicial Council website inviting public comment on a proposed revision to CACI No. 1102. Parent has not demonstrated the documents are the proper subject of judicial notice. In any event, the motion is denied as it is moot

in view of the Judicial Council's recent approval of the proposed revision (CACI No. 1102 (June 2010 rev.)), discussed in further detail in part III, *infra*.

III

DANGEROUS CONDITION INSTRUCTION: CACI No. 1102

Parent's first contention is the pattern jury instruction on dangerous condition, CACI No. 1102, is ambiguous and does not adequately explain the law. Although Parent requested the instruction in its unmodified form, she argues her refused special instructions on dangerous condition were a necessary companion to adequately explain the law. We find the instruction given was adequate and Parent was not prejudiced by the court's refusal to also give her special instructions.

"Each party is entitled to have his theory of the case submitted to the jury in accordance with the pleadings and proof [citation], and it is incumbent upon the trial court to instruct on all vital issues involved [citation]." (*Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633.) "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence[,]" and a trial court's refusal to give a proffered special instruction can constitute error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572-573.) The "'trial court is not required to give every instruction offered by a litigant nor is a party entitled to have the substance of instructions given by the court repeated in different language. [Citation.]' [Citations.]" (*Harland v. State of California* (1977) 75 Cal.App.3d 475, 486.) The trial court's duty "is fully discharged if the instructions given by the court embrace all the points of the law arising in the case." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.) A trial court's "[r]efusal to give a proposed instruction is reversible only where '"the omission misleads and confuses the jury and it is reasonably probable a result more favorable to the requesting party would have been reached in the absence of the error. [Citations.]" [Citation.]' [Citation.]" (*Hicks v. E.T.*

Legg & Associates (2001) 89 Cal.App.4th 496, 511.) With that in mind, we turn to the relevant legal principles concerning dangerous condition of public property.

A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and a negligent or wrongful act or omission of an employee of the public entity created the dangerous condition. (Gov. Code, § 835, subd. (a).) A "dangerous condition" is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).)

The law is now well established that to constitute a dangerous condition, an injured plaintiff need not prove the public "'property was actually being used with due care at the time of the injury, either by himself or by a third party . . . .'" (*Alexander v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 890, 899 (*Alexander*).) In *Alexander*, a speeding plaintiff collided with a car driven by a third party who failed to obey a stop sign. Although a jury found a dangerous condition existed at the intersection, the trial court granted the state judgment notwithstanding the verdict concluding one or both of the drivers' failure to obey to traffic laws precluded a finding the intersection had been "used with due care" and thus, "as a matter of law, no dangerous condition existed at the intersection." (*Id.* at pp. 895, 897.) In reversing, the court held, "[s]o long as a plaintiff-user can establish a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. Although a public entity may assert the negligence of a plaintiff-user as a defense, it has no bearing on the determination of a dangerous condition in the first instance." (*Id.* at p. 901.) Indeed, "'if the third party's negligence . . . is foreseeable, such third party conduct may be the very risk which makes

the public property dangerous when considered in conjunction with some particular feature of the public property[.]'" (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 153, fn. 5, quoting *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 804; see also *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 718-719 ["state gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third party's negligent conduct to inflict injury"].)

Here, the jury was given the 2003 version of CACI No. 1102. The instruction read: "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public who are using the property with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition." Parent argues the instruction was inadequate because it failed to adequately apprise the jury Stulberg's negligence had no bearing on whether the Calliope/PCH intersection was a dangerous condition.[6] She contends the jury should have also been instructed with her special instructions that would have tracked the language in CACI No. 1102's predecessor, BAJI No. 11.54, which in relevant part advised, "The phrase "used with due care" refers to whether the condition would result in injuries when used with due care by the public generally. It does not refer to the care used by any person in connection with this particular accident."

We do not find the instruction was inadequate. *Murrell v. State of California ex rel. Dept. Pub. Wks.* (1975) 47 Cal.App.3d 264 (*Murrell*), is instructive. In *Murrell*, plaintiff was injured in a bus accident on a state highway. There was evidence from which a jury could have found the bus driver was negligent, but the bus operator settled and the case went to trial against only the state on the theory the state highway

[6] In view of the jury's finding of no negligence on the part of either of the pedestrians (Parent and Miller), we need not consider any interplay of the instruction with a finding of negligence on either of their parts.

was in a dangerous condition. (*Id.* at pp. 266-267.) The jury returned a special verdict finding the highway was not in a dangerous condition. (*Id.* at p. 267.)

On appeal, plaintiff contended the jury instructions on dangerous condition were defective because they "permitted the jury to infer erroneously that a dangerous condition would not exist unless the bus driver was using the highway with due care; to guard against that erroneous inference, it was necessary to inform the jury, in explicit terms, that a dangerous condition involved a risk of harm when the public generally—not the driver of the bus—was using the highway with due care." (*Murrell, supra,* 47 Cal.App.3d at p. 268.)

The *Murrell* court agreed the dangerous condition instructions were lacking. The jury had been instructed with a version of BAJI No. 11.54 older than the one upon which Parent relies, which only informed in the language of the statute that "a dangerous condition meant a condition creating a substantial (and not a minor or trivial) risk of injury when the property was used with due care in a foreseeable manner . . . ." (*Murrell, supra,* 47 Cal.App.3d at p. 268.) But as the court explained, "None of the jury instructions specifically explained the *used with due care* clause of section 830, subdivision (a), in terms of the difference between two kinds of use—general public use and use at the time and place of the accident. As construed, Government Code section 830, subdivision (a), refers to the former kind of use, not the latter; it does so only in veiled terms; thus an instruction which simply repeats the verbiage of the statute tends to veil the statute's true meaning from the jury. Where, as here, the concurrent negligence of a third party is a focal issue, the jury should be told expressly what the statute only implies. [¶] None of the trial court's instructions—and none of the BAJI instructions—was designed to meet that need directly. A set of instructions would be erroneous which gave the jury the impression that a third party's negligent use would negate existence of a 'dangerous condition' and exonerate the public entity from liability. [Citation.] Had the trial judge supplied the jury with an instruction distinctly explaining

the *used with due care* clause, the instructions would have been improved." (*Murrell, supra,* 47 Cal.App.3d at p. 269.) (The court found special instructions requested by plaintiff were properly refused because they did not correctly state the law.) The court, however, found no error because the instructions that were given "in composite, succeeded in conveying the requisite information to the jury." (*Id.* at pp. 269-270.)

Sometime after *Murrell, supra*, 47 Cal.App.3d 264, was decided, BAJI No. 11.54 was modified to include the language Parent asserts was necessary here, i.e., that "[t]he phrase 'used with due care' refers to whether the condition would result in injuries when used with due care by the public generally. It does not refer to the care used by any person in connection with this particular accident." (Compare BAJI No. 11.54 (6th ed. 1977) with BAJI No. 11.54 (7th ed. 1986).) But Parent is wrong when she asserts CACI No. 1102 failed to adequately distinguish between the kinds of use as discussed in *Murrell*, i.e., use by the public generally and use by the persons involved in the accident. Unlike the older version of BAJI No. 11.54 criticized in *Murrell*, CACI No. 1102 did not simply repeat the verbiage of Government Code section 830, subdivision (a). It properly distinguished between the relevant uses (as did the post-*Murrell* version of BAJI No. 11.54), by defining a "dangerous condition" as one "that creates a substantial risk of injury *to members of the general public* who are using the property with reasonable care and in a reasonably foreseeable manner." (Italics added.)

The 2003 version of CACI No. 1102 identifies whose use is at issue in assessing a dangerous condition—use by the general public. The language missing from CACI No. 1102 that was in its predecessor, BAJI No. 11.54, is the latter's statement of whose use is *not* at issue in the dangerous condition determination—the persons involved in the particular accident. Although that additional language might improve the instruction, its absence does not render the instruction defective.

Following oral argument, Parent requested and was granted leave to file supplemental briefing concerning the Judicial Council's June 25, 2010, approval of a

revision to CACI No. 1102. As revised the instruction reads: "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [[*name of plaintiff*]/ [*or*] [*name of third party*]] exercised or failed to exercise reasonable care in [his/her] use of the property.]" (CACI No. 1102 (2010 rev.) (Spring ed. 2010).) The use notes for the revised instruction direct trial courts to "[g]ive the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition." (CACI No. 1102 (2010 rev.), Use Notes.)

Parent attached to her supplemental brief a copy of the Advisory Committee on Civil Jury Instructions April 5, 2010, report to the Judicial Council recommending approval of the revised instruction, although she has not requested we take judicial notice of the report.[7] Parent asserts the Advisory Committee report demonstrates it believed the 2003 version of CACI No. 1102 to be inadequate and by approving the June 2010 revision, the Judicial Council demonstrated it agreed.

Even if the report was properly before us, it would not support Parent's assertions. The report noted there was no disagreement as to the law about dangerous condition, "The disagreement seems to be only over what words best convey these concepts." (Judicial Council of Cal., Rep. and Recommendation of Judicial Council Advisory Com. on Civil Jury Instructions (Apr. 5, 2010) p. 6.) The Advisory Committee specifically reported it "believes that the original language of the instruction, the revised language posted for public comment, and the revised language now proposed for approval are all legally correct" but the instruction would be "improved by specifically

[7] We note the report confirms the revision was prompted by a request from Parent's counsel.

advising the jury that comparative fault is not to be considered in deciding whether the condition was dangerous . . . ." (*Ibid.*) The Advisory Committee's report does not provide the vindication Parent sought. That the Judicial Council and the Advisory Committee believed the instruction could be improved does not compel a conclusion it was legally inadequate as originally worded.

Furthermore, instructions cannot be viewed in a vacuum; they must be viewed in light of the other instructions that were given. "'Jury instructions are sufficient which in composite supply the jury with a well-balanced statement of the necessary legal principles. [Citation.]'" (*Harland v. State of California* (1977) 75 Cal.App.3d 475, 486.) And even where there is an omission in the instructions, we could not reverse unless there has been prejudice. (*Hicks v. E.T. Legg & Associates, supra,* 89 Cal.App.4th at p. 496, 511.)

Again *Murrell, supra,* 47 Cal.App.3d 264, is instructive. In *Murrell*, although the old version of BAJI No. 11.54 given did not explain the due care clause of section 830, subdivision (a), referred only to general public use, the court concluded other instructions "made the jury aware that the bus driver's negligent use of the highway would not relieve the state of liability for the condition of its highway. One instruction distinctly told the jury that the state would be exonerated if the bus driver's negligence were the sole proximate cause of the accident. That instruction would cause any reasoning juror to recognize that findings of dual negligence and dual causation would vary the result. At that point, the jury instructions on the duty of the vehicle driver and on concurrent causation would come into play. [¶] In particular, the instruction [on multiple causes] conveyed awareness that the state might be liable even if the negligence of the bus driver were the immediate cause of the accident. That instruction, to be sure, dealt with proximate causation. The statutory elements of 'dangerous condition' form a declaration of duty rather than a rule of proximate cause. The instruction, nevertheless, let the jury know that there were conditions under which the state and the bus driver

might both be liable for plaintiff's injuries. Although phrased in causational rather than duty parlance, this particular instruction firmly informed the jury that the bus driver's negligence, that is, his negligent *use* of the highway, need not exonerate the state." (*Id.* at pp. 269-270.)

Similar to *Murrell*, here the trial court instructed the jury on apportionment of responsibility (CACI No. 406) alerting it that more than just one party might have caused Parent's harm and the fault could be apportioned between all negligent parties. The court instructed the jury on causation (CACI No. 430) and multiple causes (CACI No. 431), and was specifically told, "A person's negligence may combine with another factor to cause harm. If you find that Defendants [Caltrans'] and/or . . . Stulberg's fault was a substantial factor in causing [Parent's] harm, then Defendants [Caltrans'] and/or . . . Stulberg are responsible for [Parent's] harm. Defendants cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [Parent's] harm." Furthermore, in argument, counsel argued extensively about the need to apportion responsibility for the accident between all parties the jury found to be negligent. Thus, viewed as a whole, we do not find the instructions were inadequate or that Parent was prejudiced by any lack of clarity in CACI No. 1102 due to its not specifically advising the jury to determine whether a dangerous condition existed without reference to Stulberg's negligence.

IV

RESPONSE TO JURY INQUIRY

Having concluded CACI No. 1102 was a legally correct instruction on dangerous condition of public property, we turn to Parent's second contention—that the trial court failed to adequately respond to the jury's inquiry about the dangerous condition question on the special verdict form. She argues the trial court violated its duties under Code of Civil Procedure section 614. We find no error.

On its second day of deliberations, just before 4 p.m., the jury sent a note to the court saying it "need[ed] help on question [No.] 3 [on the special verdict form]. Clarification would really help." Because the trial judge, Judge Moss, was ill, counsel discussed the inquiry with Judge McEachen and all counsel agreed to the court's written response: "You yourselves as jurors must answer question [No.] 3."

The next morning, while the jury continued its deliberations, Parent's trial counsel expressed concern the jury's question suggested it was confused about the law as instructed by CACI No. 1102 and asked the court to give a clarifying instruction: "In order to establish a dangerous condition, the plaintiffs are not required to prove due care on the part of Jennifer Parent or . . . Stulberg or Julie Miller in connection with this particular accident." When Judge Moss, via a conference call, observed the jury had not mentioned any specific problem with the instructions, it was agreed by all counsel Judge McEachen would start by asking the jury to be more specific about its problems with question No. 3 on the special verdict form. In response to that inquiry, the jury replied it had voted and moved on. The court declined Parent's counsel's request it give the clarifying instruction anyway.

Parent contends once the jury indicated it was having trouble with question No. 3 on the special verdict form, Code of Civil Procedure section 614 required the court bring the jury to the courtroom and provide it with additional jury instructions on dangerous condition. We disagree.

While a trial court has a duty to respond to jury inquiries, how it responds is left to the trial court's sound discretion. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331 (*Moore*).) Code of Civil Procedure section 614 is a procedural provision governing the appropriate method of communication between the trial court and jury during deliberations to ensure the court does not communicate with the jury without counsel being informed. It provides that if the deliberating jurors want testimony read back or "they desire to be informed of any point of law arising in the cause, they may require the

officer to conduct them into Court. Upon their being brought into Court, the information required must be given in the presence of, or after notice to, the parties or counsel." "The rationale underlying the requirement that the court must not answer jury requests for information out of the presence of counsel is clear—to afford counsel the opportunity of knowing on what theories and in what manner the jury is instructed." (*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 230-231.)

Nothing in Code of Civil Procedure section 614 required the court to construe the jury's vague request for help with a question on the special verdict form as a request for further instructions on dangerous condition of public property. Parent cites *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387 (*Bartosh*) for the proposition the trial court has a duty to give further instructions when the jury indicates it is confused about legal principles. *Bartosh* was a personal injury action arising out of a barroom brawl between two bar patrons in which plaintiff innocent bystander was injured. Defendant contended he acted in self-defense in striking the other bar patron. The trial instructed the jury on the right of self-defense but gave no instruction as to defendant's duty in exercising that right, i.e., that he must "exercise such right [of self-defense] with reasonable care to avoid injury to innocent bystanders." (*Bartosh, supra,* 251 Cal.App.2d at p. 386.) During deliberations the jury asked, "'One, is proof of negligence determined only by proof of who started the fight? Two, if not, by prudent action [defendant] could avoid the fight and did not, was [defendant] negligent?'" (*Id.* at p. 387.) The trial court refused to give any additional instruction. In reversing, the appellate court observed the trial court has a duty to provide further instructions if it "has given instructions which are inadequate, or are so scanty as to leave the jury without a full understanding of the law applicable to the case, and this lack of understanding is brought to the attention of the court by the jury's request for further guidance . . . ." (*Id.* at p. 787.) But unlike *Bartosh, supra,* 251 Cal.App.2d 378, as we have discussed above, here the jury instructions on dangerous condition of public property were not faulty or incomplete.

We cannot say Judge McEachen abused his discretion in responding to the jury's nonspecific inquiry about question No. 3 on the special verdict form. The jury asked for "help" and "clarification" in answering the question; the court responded the jury had to answer the special verdict question. Frequently, it is the case the court will respond to a jury request for further instruction by simply rereading the instructions given, and if the original instructions were adequate there is no error. (See *Kumelauskas v. Cozzi* (1961) 191 Cal.App.2d 572, 575 (*Kumelauskas*) [rereading previously given instructions not error]; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Furthermore, Parent's trial counsel agreed to Judge McEachen's response. "We think that if counsel . . . was dissatisfied with the statements to the jury it was his duty to say so at the time . . . ." (*Downing v. Silberstein* (1949) 89 Cal.App.2d 838, 844.) Parent contends she should not be held to her counsel's acquiescence to Judge McEachen's response because he was simply making the best of a bad situation—given the late hour and Judge Moss's unfortunate absence. But that does not relieve counsel of the obligation to state objections to the court's response. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213 [""""An attorney who submits to the authority of an erroneous, adverse ruling *after making appropriate objections or motions*, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible""" (italics added)].) If counsel was dissatisfied with Judge McEachen's response to the jury, or felt further instruction was necessary, it was his duty to say so on the record at the time. (See *Kumelauskas*, *supra*, 191 Cal.App.2d at p. 576 [party and counsel present when trial court responded to jury request and did not request further or additional instructions].)

Nor can we say that when Parent's counsel asked for further jury instructions on dangerous condition the following morning, the court abused its discretion by first asking the jury to specify its problem with the special verdict question. Again, Parent's counsel agreed to the inquiry. And when the jury returned with its response that

it had voted and moved on, we cannot say the court erred by rejecting Parent's request the court nonetheless give further instructions. As the court noted, at that point it was pure speculation as to what the jury's difficulty had been. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 53 [""""verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent""""]; Evid. Code, § 1150.) And further instruction at that point would have improperly injected the court into the jury's deliberations. (*Moore, supra,* 44 Cal.App.4th at p. 1331.) We find no abuse of the trial court's discretion in its handling the jury's inquiry.

Our dissenting colleague concludes the jury's request for assistance with question No. 3 should have prompted the trial court to give Parent's requested clarifying instruction. Our colleague surmises the words "direction on how to figure the percentages" that were written and crossed out on the jury's inquiry suggest it was in the midst of confusing legal concepts of causation and apportionment of damages with dangerous condition of public property (dis. opn. pp. 1, 6), and further that the jury's use of the word "forced" in its response to the court's inquiry (i.e., "Your response yesterday forced us to make our decision"), suggests the jury made its decision on dangerous condition believing it lacked all the information it needed (dis. opn. pp. 4, 6-7). But we cannot speculate as to what the jurors were thinking or meant in either case. On the record before us, we simply cannot say the trial court abused its discretion.

Further, we cannot say Parent was prejudiced by the court's response. In concluding Parent was prejudiced, our colleague points to the problem that arose during deliberations in which the jury was not given functioning audio-visual equipment so it could rewatch Parent's DVD depicting the conditions at the accident site. Parent does not raise any issue on appeal concerning the faulty equipment, and in any event, the relevant inquiry in assessing prejudice is whether it is reasonably probable the jury was misled into believing Stulberg's negligence precluded a finding the crosswalk constituted

a dangerous condition of public property. We do not believe the jury's inability to rewatch a DVD that it was shown during trial bears on that question.

Our dissenting colleague also expresses a specific concern, not raised by Parent, that Caltrans' counsel in closing argument inadvertently invited the jury to improperly conclude that within the meaning of CACI No. 1102, "using the property with reasonable care" refers to the persons involved in the accident, not the general public. Our colleague's concern arises because toward the end of counsel's argument he followed various statements about reasons for finding Stulberg negligent with the comment, "This is not a dangerous condition." (dis. opn. p. 6, fn. 6)

Caltrans' counsel did not invite the jury to apply the law improperly. Counsel's recap of his argument as to why Stulberg was negligent was followed by a recap of his argument as to why the crosswalk was not a dangerous condition. Counsel's comment, "[t]his is not a dangerous condition[,]" was immediately followed by his summary of testimony from the Caltrans engineer who designed the crosswalk and of the evidence about the lack of other accidents at the crosswalk, following which he repeated the statement "[i]t's not a dangerous condition" because "the general public is not having trouble going through there without having a pedestrian accident."

We do not find it is reasonably probable the jury was misled into believing Stulberg's negligence precluded it from finding the crosswalk constituted a dangerous condition. The instruction given, CACI No. 1102, told the jury a dangerous condition of public property is one "that creates a substantial risk of injury *to members of the general public* who are using the property with reasonable care and in a reasonably foreseeable manner." (Italics added.) Moreover, the jury was fully instructed on apportionment (i.e., more than one party might have caused Parent's harm and the fault could be apportioned between *all* negligent parties) and was told one defendant could not "avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [Parent's] harm." And counsel argued extensively in closing argument about the

need to apportion responsibility for the accident between all parties the jury found to be negligent. Even though the other instructions pertained to causation and apportionment, they plainly advised the jury Stulberg's negligence did not exonerate Caltrans. (*Murrell, supra,* 47 Cal.App.3d at p. 269.) Accordingly, we do not believe Parent was prejudiced by the trial court not specifically instructing the jury to determine whether a dangerous condition existed without reference to Stulberg's negligence.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, ACTING P. J.

I CONCUR:

FYBEL, J.

MOORE, J., Dissenting.

I respectfully dissent.

If this were not such a tragic case, the last portion of the trial could be called a comedy of errors. In the midst of the jury trying to determine whether or not there was a dangerous condition of public property, a difficult and sophisticated concept to say the least, one unanticipated event after another occurred.

Shortly before 4:00 p.m. on the day before the verdict, the jury submitted a question to the court about the verdict form. The question had a direct bearing on the issue of dangerous condition. The note stated: "we need help on question [No.] 3. Clarification would really help." [Question No. 3 on the verdict form reads: "Was the property of defendant State of California in a dangerous condition at the time of the incident?"] At the top of the note, the words: "direction on how to figure the percentages" were written and crossed out.

That was the first red flag. Those crossed out words. It looks suspiciously as if the jury was in the midst of confusing the concepts of causation and apportionment with the concept of dangerous condition of public property. That would not be surprising since the causation instruction, CACI No. 431, contains the phrase "substantial factor in causing harm," and the dangerous condition instruction, CACI No. 1102, has the phrase "substantial risk of injury."

We will never know for sure what the problem was. The court did not question the jury about its concern.

When instructions were first discussed among the court and counsel, plaintiff's counsel submitted a special instruction about dangerous condition.[1] The record

[1] Plaintiff's original special instruction request: Special Jury Instruction No. 4: "In order to establish a dangerous condition, the plaintiffs are not required to prove due care on the part of Jennifer Parent or Dr. Stulberg or Julie Miller in connection with this particular accident. The law does not require the plaintiff to prove that the property was actually being used with due care at the time of his injury, either by herself or by the

is silent why the court did not give it. It is understandable that the court preferred to instruct the jury with the official instruction which use is strongly encouraged in the California Rules of Court, rule 2.1050. Accordingly the jury was instructed about dangerous condition with CACI No. 1102.[2] The official instruction, as it existed during this trial, does not contain the clearness that is in BAJI No. 11.54 regarding the Government Code section 835 requirement that property must be dangerous when used with reasonable care by the general public. CACI No. 1102 does contain the words "members of the general public who are using the property with reasonable care." BAJI No. 11.54, however, adds more explanation: "The phrase 'used with due care' refers to whether the condition would result in injuries when used with due care by the public generally. It does not refer to the care used by any person in connection with this particular accident."

Since this trial, the Judicial Council improved CACI No. 1102.[3] Nonetheless, even prior to the change, the problem was an easy fix once the jury expressed its concern. Clarification was at the court's fingertips. A use note to the official instruction, CACI No. 1102, states: "The negligence of a plaintiff-user of public property . . . is a defense which may be asserted by a public entity; it has no bearing upon

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driver of the automobile involved in the accident. [¶] *Alexander v. State of California Ex Re Dept. of Transportation* (1984) 159 Cal.App.3d at 899."

[2] At the time of this trial, CACI No. 1102 read: "A 'dangerous condition' is a condition of public property that creates a substantial risk of injury to members of the general public who are using the property [or adjacent property] with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition."

[3] Since this trial, the following language has been added to the end of CACI No. 1102: "[Whether the property is in a dangerous condition is to be determined without regard to whether [[*name of plaintiff*]/ [or] [*name of third party*]] exercised or failed to exercise reasonable care in [his/her] use of the property.]" (Judicial Council of Cal. Civ. Jury Instns. (June 2010 supp.) CACI No. 1102.)

the determination of a 'dangerous condition' in the first instance." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.)

But the trial judge had gone home sick. Another judge, totally unfamiliar with the case, was called upon to attend to the matter. The following written response to the jury's note was delivered by the bailiff to the deliberation room: "You yourselves as jurors must answer Question [No.] 3."

First thing the next morning, counsel met in the chambers of the substitute judge. The original trial judge, still home sick, was on the speaker phone. Plaintiff's counsel specifically requested the jury be brought back to the courtroom and given further instructions. He argued: "So really 1102 wasn't ambiguous, but it's the combination of — it's question number 3 in conjunction with 1102, and I think it needs that clarification that they have in BAJI 11.54 that says . . . ." The trial judge, who was on the phone, interrupted counsel, saying he was familiar with the text of that instruction. Counsel urged the court to recall the jury and clarify the law, stating "the jury asked for clarification, and it really is an ambiguity in that question when you look at the definition of 1102. [¶] I would just ask — look, if they're not confused about that, then it doesn't do any harm to Caltrans, but if they really are thinking that it has to be — the plaintiff has to be negligent free and the other parties have to be negligent free, which is not the law, then I think they should be told that, your Honor." Plaintiff's lawyer submitted another clarifying instruction[4] and expressed concern that since the jury was given no help, it might simply find there was no dangerous condition and move on to decide other matters. The two judges spoke with each other and decided not to recall the jury, and that it would be more appropriate to ask the jury to be more specific in its request.

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[4] Instruction requested by plaintiff's counsel after the jury sent out its note asking for clarification: "In order to establish a dangerous condition, Plaintiffs are not required to prove due care on the part of Jennifer Parent, Dr. Stulberg or Julie Miller in connection with this particular accident."

That was the second red flag. Instead of either bringing the jury into the courtroom for questioning or clarifying the law, or both, as required by Code of Civil Procedure section 614 and requested by plaintiff's counsel, the court submitted the following note to the jurors: "Please provide the Court with more specific information regarding what it was about Question No. 3 that needed clarification?"

The jury sent back the following note: "Your response yesterday forced us to make our decision. We have voted and moved on. Thank you."

That was third red flag. And it was a critical point. The word "forced" is charged with something. Exactly what, of course, is unknown. It could be "the court abandoned us," "the court was of no help," "right or wrong, we made that decision already" or "thanks for nothing." It meant something, and the court should have taken some action immediately. The jury asked for help, was denied it and "forced" to make a decision. The court was specifically requested to bring the jury back and clarify the law. The court refused to do so.

Later that day, the jury had a verdict. It found there was no dangerous condition of public property.

It is not known what happened during deliberations. We do not have to know. There were enough clues in this case to reasonably infer the jury was confused about the law. And there were specific requests for further written clarification of the law to be given to the jury about a legal theory that has been challenging to experts for decades. (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789; *Ducey v. Argo Sales Co* (1979) 25 Cal.3d 707, 715-716; *Alexander v. State of California ex. rel. Dept. of Transportation* (1984) 159 Cal.App.3d 890, 899.)

As a practical matter, when a jury has a question, counsel usually stipulate the court may informally respond, but here appellant specifically requested the jury be brought back into the courtroom and questioned. Since 1872 the Code of Civil Procedure section 614 has required a trial court to provide further instructions when a jury has a

question about the law. Appellant argues section 614 "must be strictly complied with," (*Asplund v. Driskell* (1964) 225 Cal.App.2d 705, 712) and further argues "the trial court failed to comply with the strict mandates of section 614, failed to inquire into the jury's problem with the concept of dangerous condition and failed to provide additional instructions." "Where the trial court has given instructions which are inadequate, or are so scanty as to leave the jury without a full understanding of the law applicable to the case, and this lack of understanding is brought to the attention of the court by the jury's request for further guidance . . . the court was not relieved of the responsibility to properly instruct the jury on the controlling legal principles applicable to the case. [Citations.]" (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 387.)

"When deciding whether an instructional error was prejudicial, 'we must examine the evidence, the arguments, and other factors to determine whether it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury.' [Citation.] A 'reasonable probability' in this context 'does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility.*' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682.)

In deciding whether or not a party has been prejudiced to the extent there has been a miscarriage of justice when there is error, a reviewing court is required to examine the entire cause, including evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836. "Although the *Watson* standard is most frequently applied in criminal cases, it applies in civil cases as well." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801.)

In examining the record here, it is notable that early in the jury's deliberations, the jury wanted to view the plaintiff's DVD showing what conditions were like on the Pacific Coast Highway crosswalk on the same date and at the same time for the two successive years after the accident. The request was not surprising, since during final argument Caltrans' counsel argued plaintiff's counsel "didn't make any effort to try to replicate the lighting" on the highway at the time of the accident. Jurors were given

one piece of viewing equipment, which did not work. Then another piece of equipment was brought to the deliberation room. But before they had an opportunity to watch the video on the second, the equipment was taken away for use in another courtroom.

Also noteworthy are some portions of the final argument when Caltrans' counsel impliedly invited the jury to misapply the law, however unintentional his invitation might have been. He did talk about the public generally several times. But a few times his argument seemed to ask the jury to conclude that "using the property with reasonable care" refers to the persons involved in this accident and not to the public generally,[5] which is not what the law provides.

Prejudice is not an abstract possibility here. The jury wanted to view the video which contained evidence about whether or not there was a dangerous condition. The court, however, did not provide the jury with equipment to watch the video. The jury sent out a note specifically asking for help in answering a question about dangerous condition. However, the court failed to provide clarification. The crossed out portion of the jury's note provides some indication the jury may have been bewildered with the sophisticated and complicated areas of law it was supposed to apply, but the court did not bring the jury back to further explain the law. The jury's later note saying it was "forced" to make a decision reads as if the jury realized it did not have all the facts needed to make its decision.

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[5] Caltrans' counsel's argument about plaintiff's and codefendant's negligence causing the accident consumes 10 pages of the reporter's transcript. Then it appears he changed topics. He listed the elements of a dangerous condition of public property and argued about the issue. In that portion of his argument, he stated: "And these markings in the number one lane were visible. We saw the police photos. The faded area off to the right wasn't in play, mostly because Dr. Stulberg [the codefendant] noticed nothing about this intersection. Nothing. Not one shred of testimony from Dr. Stulberg or any of the experts in this case that Dr. Stulberg noticed anything about this intersection."

Later in his argument, Caltrans' counsel said about the codefendant who hit the plaintiff: "He never hit his brakes. He never took an evasive maneuver. He didn't do anything. Thought he was mid-block. Thought a brick crashed through his windshield." Counsel's very next sentence was: "This is not a dangerous condition."

Shortly after this trial, the Judicial Council rewrote the instruction to improve it, so it is not surprising the jury found it difficult to answer the question on the verdict form about whether there was a dangerous condition of public property and asked for help. Besides submitting numerous clarifying instructions for the court to consider, plaintiff's counsel specifically requested the court to bring the jury back and provide it some further clarification on the law. The court failed to bring the jury back or to clarify the law.

I certainly recognize a party is not entitled to a perfect trial. But it is not too much to ask for a fair trial. And a crucial portion of this trial was not fair. It is not the trial judge's fault that he became ill. Nonetheless, not only was the jury inadequately instructed on the law, but the court failed to recall the jury to inquire about what kind of help it needed and failed to provide equipment for it to view the evidence. I am of the opinion it is reasonably probable a result more favorable to appellant would have been reached if the court had clarified the law for the jury. What happened in this trial amounts to a miscarriage of justice. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) I think we should reverse and order a new trial.

MOORE, J.